APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16582

MADGE VINSON, surviving wife, ET AL., *Appellants*

v.

CHARLES EINBINDER, Deputy Commissioner, Bureau of Employees' Compensation, ET AL., *Appellees*

Appeal from the United States District Court for the District of Columbia

Decided June 14, 1962.

Mr. Martin E. Gerel, with whom *Messrs. Lee C. Ashcraft* and *Joseph H. Koonz, Jr.*, were on the brief, for appellants.

Mr. Herbert P. Miller, Assistant Solicitor, Department of Labor, with whom *Messrs. Charles Donahue*, Solicitor, Department of Labor, *David C. Acheson*, United States Attorney, and *Nathan J. Paulson*, Assistant United States Attorney, were on the brief, for appellee Einbinder.

Mr. M. S. Mazzuchi for appellees Aetna Casualty & Surety Company and McCloskey Enterprises, Inc.

Before EDGERTON, BAZELON and WASHINGTON, *Circuit Judges*.

EDGERTON, *Circuit Judge:* This is a workman's compensation case. 44 STAT. 1424, 33 U.S.C. § 901; 45 STAT. 600, D.C.Code § 36-501 (1961).

On July 7, 1959, Henry Vinson was "driving and backing" his employer's truck "in various positions", on the

construction site of a new House Office building, when he slumped over in the cab of the truck and died instantly of coronary insufficiency and coronary sclerosis. He had been driving and occasionally backing for 1½ to 2½ hours. A crane was mounted on the truck. The weight of the whole was about 68,000 pounds (34 tons). The truck did not have power steering.

Though the work Vinson was doing when he died was, as the Deputy Commissioner found, a normal part of his job, the Deputy Commissioner denied compensation to Vinson's widow and children. He found that Vinson "was not subjected to heavy physical strain" and that death "did not result from injury arising out of and in the course of the employment". There is no substantial support in the record for these findings. The District Court therefore erred in granting summary judgment for the appellees in this suit by the appellants to set aside the order denying compensation.

"Our task is to ascertain whether the Deputy Commissioner's findings are supported by substantial evidence upon the record considered as a whole . . . The reviewing court will not sustain the administrative findings merely because they are substantiated by some isolated evidence. Our review must also take account of the settled rule that the Act is to be construed with a view to its beneficent purposes. Doubts, including the factual, are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton*, 95 U.S.App.D.C. 139, 141, 220 F.2d 820, 822.

Anyone who distinctly remembers turning and backing an ordinary car, without power steering, when the car was moving slowly, knows it was hard work. Obviously it would have been harder if the car had weighed 34 tons. If there were no evidence in the present record that driving and backing 34 tons of truck and crane, without power steering, on a construction site, was strenuous work, we might per-

haps take judicial notice of the fact. But there is ample evidence.

A fellow employee of Vinson testified that moving the steering wheel of the truck was "hard labor . . . very hard. A hard maneuver. . . .I know of many times I reached up and actually helped him pull the wheel around." A heavy "counterweight" was usually over the rear wheels of the truck but was over the front wheels when Vinson died. The operator of the crane on the truck testified that this position of the counterweight made steering hard for the truck driver and that sometimes "it would take two people [to] turn the wheel. . . . When you make a tight turn you need all the help you can get." A foreman testified that when Vinson died he was "maneuvering and backing in to a very tight and difficult spot." The fellow employee had suggested to Vinson that he "get a lighter job . . . because it was just too much for a man his age and it took a young man with a lot of muscle power to drive it." He made this suggestion "watching him sweat and try to turn that rig around, trying to get it back into places and stuff like that . . . . Because I seen it was hard work for him." Vinson himself had talked about getting an easier job "because it was pretty hard to steer, especially in that particular position." Shortly before Vinson died, as on earlier occasions, he had been helped in turning the wheel. There is no suggestion he was being helped when he died.

A witness who succeeded Vinson as operator of the truck testified that it was "quite hard" to steer and that he needed help a "number of times". He undertook to explain this by saying that "with the anchor bolts in the positions that they were in accordance with the H beams, you have to back in between the H beams and the anchor bolts being in the way, . . . you have to stop, turn the wheel while sitting still, which is a lot harder to steer than it is if you are moving, and to miss these anchor bolts, you have to move the wheel as far as possible to

clear these bolts and to get back in between the H beams. And it is quite a strain."[1]

One witness who had operated a similar "rig" but not this one thought "extraordinary strength" was not required. Another such witness thought this truck was no more difficult to manage than any other truck with manual steering but "all truck driving is a manual operation and it is hard work".

Dr. Ethridge, a specialist in cardiology, concluded from the autopsy report that Vinson had a pre-existing arteriosclerosis. He thought the work Vinson "was performing was competent to precipitate, to accelerate an arteriosclerotic condition to the point where it causes death from coronary insufficiency, secondary to sclerosis." "Strenuous physical effort" could, and probably did, cause Vinson's death. Sometimes, this exertion, physical exertion, causes no difficulty and other times it could cause either death or a heart attack . . . and it is often very difficult to know why on a particular day a certain degree of effort produces a lot of trouble—I mean, patients end up in the hospital because they have difficulty or even die, and on another day seemingly might have done something similar without difficulty."

Dr. Walsh, another specialist in cardiology, gave it as his "conclusion that there was no evidence that there was a relationship between his work and his death", but he based this conclusion on a belief that there was no "definite evidence . . . as to whether this man at the time that he died was engaged in extra strenuous activity . . . ." No one who knew the record could have entertained such a belief. He recognized that if "one was doing something very strenuous, something unusual, then we would say, or I would say it was probably that there was a relationship

[1] As this witness was the last, the medical witnesses did not have the benefit of his testimony.

between actually an individual's sudden death due to acute coronary insufficiency and this unusual effort." He recognized that "Certainly the job must have been at times strenuous if it took two men to turn the wheel of the truck. That would be obvious to everyone." Since Vinson was "maneuvering and backing in to a very tight and difficult spot" when he died, it seems clear that this was one of the times when his job was very strenuous. He was doing alone the sort of thing it sometimes took two men to do.

The judgment is reversed and the case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

BRIEF IN OPPOSITION TO PETITION FOR WRIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 654

AETNA CASUALTY & SURETY CO.

and

McCLOSKEY ENTERPRISES, INC., *Petitioners,*

v.

MAUDE VINSON, ET AL., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion and judgment in the United States Court of Appeals for the District of Columbia Circuit have not yet been officially reported. The unofficial report is found in 307 F. 2d 387 (Appendix A).

JURISDICTION

The judgment of the Appeals Court was entered on June 14, 1962. A Petition for Rehearing En Banc was denied En Banc, September 12, 1962. The Petition for a Writ of Certiorari to this Honorable Court was filed December 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTE INVOLVED

The following provision of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*) is applicable:

> Presumptions
>
> Section 920. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this Act. * * *

QUESTION PRESENTED

1. Where the record as a whole contains substantial evidence to support a finding in favor of a widow's claim, can a deputy commissioner deny the claim based on some isolated evidence?

STATEMENT OF THE CASE

This is a case involving the death of Henry Vinson, in the cab of a truck crane, while employed as an oiler at a construction site in Washington, D. C.

On July 7, 1959, at approximately 10 a.m., Henry Vinson, husband and father of the respondents, was employed as an oiler for the McCloskey Enterprises, Inc.,

at the construction site of the newest House Office Building. On the date indicated, Mr. Vinson suffered a heart attack and died in the cab of a truck crane while in the course of his employment.

After a hearing before Charles Einbinder, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, an order was entered denying the claim for death benefits filed by the respondents. The rejection of the claim by the Deputy Commissioner was primarily based on a finding of fact that the employee was not subject to heavy strain during the period immediately prior to his death and consequently that the death of the employee, Mr. Vinson, was not caused by an injury arising out of and in the course of employment.

An action to set aside the rejection of the death benefits claim was filed on behalf of Madge Vinson and her minor daughters. In response, the Department of Labor, on behalf of the Deputy Commissioner, filed a motion for summary judgment as did the petitioners. After hearing oral argument, the United States District Court for the District of Columbia granted the motion and the complaint was dismissed.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, a three-judge panel unanimously reversed the lower court decision and remanded the case for further proceedings consistent with their opinion. A petition for rehearing en banc was filed by the petitioners and denied by a divided court.

SUMMARY OF ARGUMENT

The claim of the widow and her children was denied by the deputy commissioner. The reversal by the United States Court of Appeals for the District of Columbia is in keeping with prior decisions of this Circuit and the views many times expressed by this Honorable Court.

The decisions consistently hold that there must be substantial evidence in the record to support a position taken by a deputy commissioner particularly in denying a claim. It is not enough to enter an order based on isolated facts. This was the position taken by the majority opinion.

Inasmuch as the decision as it presently exists is fully in accord with prior decisions of the United States Court of Appeals for the District of Columbia Circuit and the United States Supreme Court, this petition should be denied.

ARGUMENT

For the reasons which follow it is respectfully submitted that the District of Columbia Circuit holding is in full accord both with the Supreme Court's decision in *O'Leary* v. *Brown Pacific-Maxon, Inc.*, 340 U.S. 504 and its prior decision in *Friend* v. *Britton*, 95 U.S. App. D.C. 139, 141, 220 F. 2d 820, 822. The present decision is in no way in conflict with any decision of this Court. Rather, it is harmonious with the underlying principles of the cases as to which petitioner says a conflict exists.

The criteria used under these circumstances is set forth in *O'Leary, supra*:

> "... The standard, therefore, is that discussed in *Universal Camera Corp.* v. *National Labor Rela-*

tions Board, 340 U.S. 474, 71 S. Ct. 456. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole . . ."

The guide in determining issues raised in any claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901; D. C. Code Sec. 36-501 (1961); is found in section 920:

Presumptions

"In any proceeding for the enforcement of a claim for compensation under this Act, it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act . . ."

Recognizing the fact that in order to enter an award or deny a claim, the findings of fact by the deputy commissioner must be supported by "substantial evidence" the United States District Court for the District of Columbia Circuit stated:

"Our task is to ascertain whether the Deputy Commissioner's findings are supported by substantial evidence upon the record considered as a whole . . . The reviewing court will not sustain the administrative findings merely because they are substantiated by some isolated evidence. Our review must also take account of the settled rule that the Act is to be construed with a view to its beneficent purposes. Doubts, including the factural, are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton,* 95 U.S. App. D.C. 139, 141, 220 F. 2d 820, 822.

The petitioners submit that the Court of Appeals flagrantly invaded the fact-finding function of an administrative body. The respondents respectfully suggest that there was no such invasion and that in fact to have allowed the decision of the deputy commissioner to stand, would have been a gross miscarriage of justice and a total disregard for the purpose and intent of workmen's compensation law.

A brief look at the record adduced at the hearing of this claim is ample proof that the deputy commissioner's findings of fact were not supported by substantial evidence upon the record considered as a whole.

The decedent's widow testified that her husband complained all the time that the job was too hard and that the work he was doing was too much for him. (R. 8, 10)

The operator of the rig Mr. Vinson was driving stated that it was hard to steer, especially in this case, since the counter-weight was over the cab and that when a tight turn was being made assistance was required. On different occasions he had seen at least two employees help in turning the rig. (R. 23, 24, 33, 34, 38)

The total weight of the crane was 68,000 pounds and it had no power steering. (R. 140, 143)

The rig was still moving at the time of Mr. Vinson's death and had to be stopped by a fellow worker before he was taken out of the truck. (R. 42)

A fellow employee had suggested to Vinson that he get a lighter job because it was just too much for a man his age and it took a young man with a lot of muscle power to drive it. (R. 50)

A witness who succeeded Vinson as operator of the truck testified it was the hardest rig he had operated and that although he was a young man he needed help to steer a number of times. (R. 189, 190, 194)

The specialists in cardiology both testified that strenuous physical effort could and probably did cause coronary insufficiencies. There was no conflict in medical testimony. The difference was in the facts given on which their opinion was based. (R. 96, 177)

The record appears quite inconsistent with the findings of fact made by the deputy commissioner. The respondents submit the decision of the United States Court of Appeals for the District of Columbia Circuit is a just and proper one based on the foregoing facts.

It is interesting to note that in the majority of cases relied on by the petitioners an award had been entered in favor of the claimant and appeals had been taken to set aside the award. (See: *U. S. Fidelity & Guaranty* v. *Britton*, 88 U.S. App. D.C. 135; 255 F. 2d 544; *Liberty Mutual Insurance Co.* v. *Britton*, 100 U.S. App. D.C. 236, 243 F. 2d 659.)

In *Vendemia* v. *Christaldi*, 221 F. 2d 103; (1955), the Court of Appeals in an unanimous decision remanded to the Deputy Commissioner who had denied widow's benefits in a heart case whose facts were that the decedent was "about 50 years of age and apparently enjoyed good health;" on the day of his death, "he suddenly and unexpectedly suffered a severe attack accompanied by pain in the chest" after lunch, which followed several hours of carrying iron bars up 40 steps from a basement to a second floor. After eating lunch, the employee complained of chest pain, took

a drink of water, then another, went to the cab of a truck where he lay down and was later found dead.

The Court of Appeals said:

> "We have held that the occurrence of an injury in the course of employment strengthens the presumption that it arises out of the employment, with doubts resolved in the claimant's favor. (*Hartford Accident & Indemnity Co.* v. *Cardillo*. 72 App. D.C. 52, 54, 112, F. 2d 11, 13, *certiorari denied*, 310 U.S. 649, 60 S. Ct. 1100, 84 L. Ed. 1415. And we have also held that where death in the course of employment is due to an illness which has taken a sudden and unusual turn for the worse, not shown by substantial evidence to be unrelated to the employment, the statutory presumption makes the death compensable." *Robinson* v. *Bradshaw*, 92 U.S. App. D.C. 216, 206 F. 2d 435, *certiorari denied*, 346 U.S. 899, 74 S. Ct. 226, 98 L. Ed. 400.

The petitioner alleges that there was absolutely no evidence in the record that the employee was engaged in any activity when he died. The record speaks for itself. The uncontradicted testimony from the decedent's foreman on the day of his death was that Mr. Vinson was backing the truck crane into a difficult position and making a sharp turn at the same time. (R. 77) The foreman further testified that they were maneuvering and backing it into a very tight and difficult spot at the time of Mr. Vinson's death. (R. 77)

This testimony together with additional testimony previously mentioned would certainly support the respondents position that Mr. Vinson was engaged in strenuous activity and as such his death was caused by his work. The finding to the contrary by the deputy commissioner was unsupported by substantial evidence.

To deny this petition and allow the opinion of the Court of Appeals to remain would in no conceivable way render the fact-finding powers of the Deputy Commissioner negatory. On the contrary, it would serve to re-emphasize the necessity to apply the Longshoremen's and Harbor Workers' Compensation Act according to the letter and spirit of the law.

The respondents pray, therefore, that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit be denied.

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